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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

CHARLES G. HULSE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Charles G. Hulse, plaintiff in the Court below, through his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on November 7, 1956.

OPINION BELOW

The opinion of the Court of Claims (R. 11-17) is reported at 137 F. Supp. 745.

JURISDICTION

The judgment of the Court of Claims was entered on November 7, 1956 (R. 19). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether an enlisted man of the United States Navy, who first enlisted in the Navy prior to July 31, 1925, and who served continuously under successive terms of enlistment until he was transferred to the Fleet Reserve after completing more than 16 years of active naval service and who was immediately recalled to active duty and served sufficiently long after recall to active duty to complete a total of more than 20 years' active service in the Navy and whose conduct marks during more than 20 years of active naval service were 95 per cent or more of the maximum, is entitled to a 10 per cent increase in his retainer or retired pay on account of said good conduct marks.

STATUTES INVOLVED

Section 26 of the Naval Reserve Act of 1925, 43 Stat. 1080, 1087, provides:

> "Section 26. Enlisted men serving in the regular Navy on the date of the approval of this Act, or who, having been discharged therefrom, reenlist in the regular Navy within three months from date of discharge, or who are serving in the Naval Reserve Force on the date of the Act in an enrollment entered into within four months from the date of their discharge from the regular Navy and hereafter reenlist in the regular Navy within three months from the date of their discharge from the Naval Reserve, herein created, shall be entitled to be transferred to the Fleet Naval Reserve on the completion of sixteen or more years' naval service, and when so transferred shall, except when on active duty, be entitled to receive, if they have had sixteen but less than twenty years' naval service, pay at the rate of one-third the base pay they are receiving at the time of transfer, plus

all permanent additions thereto, and if they have had twenty or more years' naval service, pay at the rate of one-half of the base pay they are receiving at the time of transfer, plus all permanent additions thereto: *Provided,* That the pay authorized in this section shall be increased 10 per centum for all men who may be credited with extraordinary heroism in the line of duty or whose average marks in conduct for twenty years or more shall not be less than 95 per centum of the maximum; *Provided further,* That for all purposes of this section a complete enlistment during minority shall be counted as four years' service and any enlistment terminated within three months prior to the expiration of the term of such enlistment shall be counted as the full term of service for which enlisted."

Sections 203 and 204 of the Naval Reserve Act of June 25, 1938, 52 Stat. 1175, 1178, provide:

"Sec. 203. Men serving in the Regular Navy, who, having enlisted therein on July 1, 1925, or prior thereto, or who having been discharged therefrom prior to July 1, 1925, and reenlisted in the Regular Navy within three months from the date of discharge, or who were serving in the Naval Reserve Force on July 1, 1925, in an enrollment entered into within four months from the date of their discharge from the Regular Navy and thereafter reenlisted in the Regular Navy within three months from the date of their discharge from the Naval Reserve created by the Act of February 28, 1925, shall be entitled to be transferred to the Fleet Reserve on the completion of sixteen or more years' naval service, and when so transferred shall, except when on active duty, be entitled to receive, if they have had sixteen but less than twenty years' naval service, pay at the rate of one-third the base pay they were receiving at the time of transfer, plus all permanent additions

thereto, and if they have had twenty or more years' naval service, pay at the rate of one-half of the base pay they were receiving at the time of transfer, plus all permanent additions thereto: *Provided,* That the pay authorized in this section shall be increased 10 per centum for all men who may be credited with extraordinary heroism in the line of duty or whose average marks in conduct for twenty or more years shall not be less than 95 per centum of the maximum: *Provided further,* That the determination of the Secretary of the Navy as to the definition of extraordinary heroism shall be final and conclusive for all purposes.

"Sec. 204. Men serving in the Regular Navy on the date of the passage of this Act, who first enlisted in the Navy after July 1, 1925, or who reenlisted therein after July 1, 1925, having been out of the Regular Navy for more than three months, and men who first enlisted in the Regular Navy after the passage of this Act, may upon their own request be transferred to the Fleet Reserve upon the completion of at least twenty years' naval service: *Provided,* That they are physically and otherwise qualified to perform duty in time of war. After such transfer, except when on active duty, they shall be paid at the rate of one-half of the base pay they are receiving at the time of transfer: *Provided further,* That all enlisted men transferred to the Fleet Reserve in accordance with the provisions of Sections 1 and 203 of this Act shall, upon completion of thirty years' service be transferred to the retired list of the Regular Navy, with the pay they were then legally entitled to receive and the allowances to which enlisted men of the Regular Navy are entitled on retirement after thirty years' service: *And provided further,* That all enlisted men transferred to the Fleet Reserve in accordance with the provisions of this section shall, upon

completion of thirty years' service, be transferred to the retired list of the Regular Navy, with the pay they were then legally entitled to receive, plus all permanent additions thereto, and the allowances to which enlisted men of the Regular Navy are entitled on retirement after thirty years' service."

Section 204 of the Act of June 25, 1938, was amended by Section 2 of the Act of August 10, 1946, 60 Stat. 933, to read as follows:

"Sec. 2. Section 204 of the Naval Reserve Act of 1938 (52 Stat. 1179) is hereby amended to read as follows:

"Sec. 204. Members of the Navy who first enlisted in the Navy after July 1, 1925, or who reenlisted therein after July 1, 1925, having been out of the Regular Navy for more than three months, may upon their own request be transferred to the Fleet Reserve upon the completion of at least twenty years' active Federal service. After such transfer, except when on active duty, they shall be paid at the annual rate of 2½ per centum of the annual base and longevity pay they are receiving at the time of transfer multiplied by the number of years of active Federal service; *Provided,* That the pay authorized in this section shall be increased 10 per centum for all men who may be credited with extraordinary heroism in the line of duty: *Provided further,* That the determination of the Secretary of the Navy as to the definition of extraordinary heroism shall be final and conclusive for all purposes: *Provided further,* That the pay authorized in this section shall not exceed 75 per centum of the active-duty base and longevity pay they were receiving at the time of transfer: *Provided further,* That all enlisted men transferred to the Fleet Reserve in accordance with the provisions of this

section and of sections 1 and 203 of this Act shall, upon completion of thirty years' service, be transferred to the retired list of the Regular Navy, with the pay they were then legally entitled to receive: *Provided further,* That nothing contained within this section shall be construed to prevent persons who qualify for transfer to the Fleet Reserve under the provisions of section 203 of this Act from being transferred in accordance with the provisions of this section if they so elect: *Provided further,* That a fractional year of six months or more shall be considered a full year for purposes of this section and section 203 in computing years of active Federal service and base and longevity pay: *And provided further,* That the provisions of this section shall apply to all persons of the class described herein heretofore or hereafter transferred to the Fleet Reserve, except that no increase in pay or allowances shall be deemed to have accrued prior to the date of the enactment of this amendment. For the purposes of this section, all active service in the Army of the United States, the Navy, the Marine Corps, the Coast Guard, or any component thereof, shall be deemed to be active Federal service."

A new Section 208 was also added to the Act of June 25, 1938, by Section 3 of the Act of August 10, 1946, which reads as follows:

"Sec. 3. Title II of the Naval Reserve Act of 1938 (52 Stat. 1178) is hereby amended by adding thereto a new section to read as follows:

"Sec. 208. Whenever enlisted men of the Fleet Reserve, transferred thereto after more than sixteen years' service, or enlisted men transferred from the Fleet Reserve to the retired list of the Regular Navy, perform active duty after July 1, 1925, such active duty, except that which they are required to perform in time of peace under section 206 of this title, shall be included in the com-

putation of their total service for the purpose of computing their retainer or retired pay when in an inactive-duty status, and in the computation of their retainer or retired pay all active duty so performed subsequent to the effective date of transfer to the Fleet Reserve or to the retired list shall be counted for the purpose of computing percentage rates and increases with respect to their retainer or retired pay and shall be based on the enlisted pay received by them at the time they resume an inactive-duty status, including increased in consequence of advancement in rating, longevity, and extraordinary heroism: *Provided,* That such pay shall not exceed 75 per centum of the base and longevity pay of the highest rating to which entitled under the provision of this section: *Provided further,* That active duty performed during any period of national emergency declared by the President shall be considered for the purpose of this section as not being active duty in time of peace required by section 206: *Provided further,* That nothing contained in this section shall operate to reduce the retainer or retired pay and allowances to which any enlisted man would otherwise have been entitled: *Provided further,* That a fractional year of six months or more shall be considered a full year for purposes of this section in computing years of active Federal service and base and longevity pay: *And provided further,* That persons of the classes described in this section who have been retired or returned to an inactive duty status prior to the date of approval of this section shall be entitled to the benefits of this section from the date of retirement or return to an inactive duty status."

Finally, Section 9 of the Act of August 10, 1946, *supra,* provided:

"Sec. 9. No back pay for any period prior to the date of enactment of this Act shall accrue to any

person by reason of the enactment of this Act except as otherwise provided in section 3. No person, active or retired, of any of the armed forces, shall suffer, by reason of this Act, any reduction in any pay, allowances, or compensation to which he was entitled upon the effective date of this Act. Retired enlisted personnel of the Navy and Marine Corps, personnel of the Navy and Marine Corps who are members of the Fleet Reserve or Fleet Marine Corps Reserve, and personnel of the Navy and Marine Corps who become eligible and who apply for transfer in the Fleet Reserve or Fleet Marine Corps Reserve shall receive an opportunity to elect to receive retainer and retired pay under the provisions of this Act, or to receive such pay under the provisions of law in effect immediately prior to the date of the enactment of this Act, and these persons shall be entitled to receive the pay elected."

STATEMENT

On May 17, 1915, plaintiff first enlisted in the United States Navy. After serving through successive terms of enlistment he was, on July 1, 1931, transferred to the Fleet Reserve in Class F4C, credited with more than 16 years' active service under the provisions of Section 26 of the Naval Reserve Act of 1925. He was immediately recalled to active duty and served continuously on active duty attaining the temporary rank of Lieutenant until December 8, 1945, when he was released to inactive duty.

After release from active duty, plaintiff received retired pay based upon one-third of his base pay as increased by 50 per cent for longevity. In his action in the Court of Claims, plaintiff claimed in the alternative the difference in the retired pay received by him since his release from active duty on December 8, 1945,

and the pay to which entitled when his retired pay was computed either (1) on the basis of one-half his base pay, plus permanent additions thereto as increased by 10 per cent on account of good conduct marks averaging more than 95 per cent during more than 20 years of active naval service or (2) when computed at the rate of 2½ per cent of his active duty pay multiplied by 30, the years of active service with which he is credited.

The Court of Claims held that after the effective date of the Act of August 10, 1946, *supra,* the plaintiff was entitled to have his retired pay computed at the rate of 2½ per cent of his active duty pay, multiplied by his years of active service but that for the period from December 8, 1945, to the effective date of the Act of August 10, 1946, *supra,* he was entitled to have his retired pay computed on the basis of one-half his base pay plus permanent additions thereto, but was not entitled to receive the 10 per cent increase in such pay on account of good conduct marks averaging more than 95 per cent during more than 20 years of active naval service.

REASONS FOR GRANTING WRIT

1. The decision of the Court below affects the retainer or retired pay of, conservatively, more than 3,000 retired enlisted men of the United States Navy. Further, the decision of the Court below reverses in part its decision in *Sanders* v. *United States,* 120 C. Cls. 501, where the Court specifically recognized the right of enlisted men of the United States Navy who had first been transferred to the Fleet Reserve upon the completion of more than 16 years' active naval service and who were recalled to active duty during

World War II and served sufficiently long to complete more than 20 years' active naval service, to the 10 per cent increase on account of good conduct as provided in Section 203 of the Naval Reserve Act of June 25, 1938, as amended by the Act of August 10, 1946, *supra*. After announcing its decision in the *Sanders* case, on January 9, 1951 the Court on its own motion, on June 5, 1951, vacated its decision and remanded the case for further briefing and for argument on the sole question of the plaintiff's right to the good conduct increase. After the submission of such briefs, reargument of the case by counsel and further consideration by the Court, it, on November 6, 1951, reinstated its original opinion in the case. More than 3400 claims of retired enlisted men for increased retired or retainer pay, including a compromise settlement of 5 per cent increase in such pay on account of good conduct, were then settled with the approval of the Court by petitioner's counsel and the respondent's counsel.[1]

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[1] Commencing with *Camille Adams et al.* v. *United States*, C. Cls. No. 49607, and continuing through *Carl Julius Stahnke* v. *United States*, C. Cls. No. 507-55, some 62 group petitions have been filed in the Court of Claims, and judgments entered in some 3,400 claims on the basis of the decision in *Sanders* v. *United States, supra*, with an increase in retired pay on account of good conduct.

There are presently pending in the Court of Claims the following group petitions which include more than 1,000 claimants all of whose claims depend upon the final decision in this case: *Acosta et al.* v. *United States*, C. Cls. No. 370-55; *Acol et al.* v. *United States*, C. Cls. No. 410-55; *Fernandes et al.* v. *United States*, C. Cls. No. 451-55; *Abarr et al.* v. *United States*, C. Cls. No. 40-56; *Haimowitz et al.* v. *United States*, C. Cls. No. 41-56; *Prendable et al.* v. *United States*, C. Cls. No. 42-56; *Abercrombie et al.* v. *United States*, C. Cls. No. 221-56; *Armstrong et al.* v. *United States*, C. Cls. No. 249-56; *Abengosa et al.* v. *United States*, C. Cls. No. 456-56.

2. Respondent's argument in the Court below was based essentially on the point that there is no statutory authority for the good conduct increase. The short answer to this is that Section 203 of the Naval Reserve Act of 1938, *supra,* is still in effect and specifically provides that the pay authorized by that section shall be increased 10 per cent for all men whose average marks in conduct for 20 or more years shall not be less than 95 per cent of the maximum. The amendatory Act of August 10, 1946, did not delete or repeal Section 203, which is still in full force and effect. The Act should be construed to give effect to the entire Act and an interpretation that emasculates a portion of it is to be avoided. *cf. United States* v. *Alpers,* 338 U.S. 680; *United States* v. *Menasche,* 348 U.S. 528. Also, it is difficult to understand why the government counsel would stipulate to the entry of more than 3,400 judgments recognizing claims for good conduct increase if in fact it was convinced that there was no statutory authority for such increased pay.

3. In disallowing the good conduct item of the claim, the Court below attached considerable weight to the legislative history of the bills which were introduced into Congress, one of which ultimately was enacted as the Act of August 10, 1946, *supra.* It is submitted that the legislative history when analyzed does not establish any intent on the part of Congress to take away from enlisted men of the Navy their right to the good conduct increase. The original bill, S. 1438, 79th Cong., did contain in Section 208 a provision specifically authorizing the good conduct increase. This provision was deleted from Section 208 in the course of the passage of S. 2460, 79th Cong., which was

offered as a substitute for the original S. 1438. Nowhere in the Committee hearings or in the statements of the legislators responsible for the bill in either House of Congress is there any explanation for the deletion of this provision from Section 208 of the original bill. *cf. Guessefeldt* v. *McGrath,* 342 U.S. 308.

The Court below, in disallowing the good conduct item, attached great importance to the fact that no reason for the omission of the good conduct increase in Section 208 had been suggested and that none occurred to it. It felt that it was not in its province to insert the omitted language and accordingly overruled that part of the *Sanders* decision which awarded good conduct pay. Petitioner feels that there are several very obvious reasons for its omission. The first and most important is that such a provision in Section 208 would have been redundant and unnecessary as the good conduct increase was already authorized by Section 203 of the Naval Reserve Act of 1938, which the Act of August 10, 1946, amended.

A second compelling reason for its omission lies in the fact that S. 1438 when originally introduced applied only to the Navy, but the substitute bill, S. 2460, applied to both the Army and Navy. In view of the fact that Section 208 provided only for benefits and increases in pay accruing by reason of service after recall to active duty and not on account of service performed prior to transfer to the Fleet Reserve or the retired list, and that there had never been any provision made for the payment of good conduct increases to retired personnel of the Army, it was logical and reasonable to delete the provision relating to good conduct increase from Section 208. Thus, by leaving

the provision for the good conduct increase in Section 203, Congress limited its application to personnel of the Navy, and further, made its payment to men in the 16-year class of the Fleet Reserve contingent upon their conduct marks for active service performed both before their original transfer to the Fleet Reserve as well as after their transfer thereto.

4. The decision of the Court below disallowing the good conduct increase fails to give consideration to the fact that Section 208 is remedial legislation. One of its principal purposes was to equate the rights of Fleet Reservists who had been originally transferred with credit for 16 years' service, but less than 20 years' service, and who were subsequently recalled to active duty for a period sufficiently long to make his total naval service in excess of 20 years, with the rights possessed by those men who had originally transferred to the Fleet Reserve after the completion of more than 20 years of active service. The primary differences between the rights of the 16- and 20-year classes were the right of the 20-year class to receive one-half of their base pay as retainer pay in lieu of the one-third of the base pay paid to the 16-year class, and the right of the 20-year class to receive the 10 per-cent increase for good conduct provided their marks in conduct averaged 95 per cent or better.

That this was a primary purpose of the bill is clearly shown by the testimony given by Captain Herbert G. Hopwood of the Bureau of Naval Personnel who appeared before the Senate Committee on Naval Affairs as the Navy Department's official spokesman. Captain Hopwood's testimony as it appears at pages 9-10 of the Transcript of Hearings before said Committee on October 9, 1945, is as follows:

[*pp. 9-10*]. *Captain Hopwood.* Under present law a man who was transferred to the Fleet Reserve after 16 years' naval service receives retainer pay at the rate of one-third of his base pay at the time of transfer plus all permanent additions thereto. If this man performs active duty during the war as approximately 2,300 have done, he receives, on return to inactive duty, retainer pay, still at the rate of one-third of the base pay plus permanent additions. The permanent additions have increased 5 percent after each 3 years because of longevity increases.

Even though he completed sufficient active duty to qualify for the 20-year Fleet Reserve he may not receive the benefits of that Reserve.

Section 3 of this proposed bill is designed to permit this man to enjoy the benefits of the 20-year Fleet Reserve. (Emphasis supplied.)[2]

If the decision of the Court below stands, the recalled members of the 16-year class will not receive all the benefits received by the 20-year class. As remedial legislation, a liberal construction should be placed upon the Act giving effect to the Congressional purpose. *United States* v. *Padelford,* 9 Wall. 531; *Heikkila* v. *Barber,* 345 U.S. 229; *Voris* v. *Eikel,* 346 U.S. 328. Moreover, there is no valid reason to distinguish men in the 16-year class who later completed 20 years of active service from men who initially completed 20 years of service before transferring to the Fleet Reserve. Both have given the Nation the same service and both should therefore receive the same retainer pay and additions thereto.

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[2] As previously indicated the Navy Department's estimate of the number of men affected by this legislation was highly inaccurate.

Subsequent legislation by Congress indicates that it was intended that retired enlisted men of the Navy should retain the good conduct increase provided by Section 203 of the Naval Reserve Act, as amended, *supra*. This is indicated by the fact that in the Act of August 4, 1949, 63 Stat. 521, as amended by the Act of August 3, 1950, 64 Stat. 407, providing for the retirement of enlisted men of the Coast Guard, after 20 years' active service, the Congress made provision for a 10 per cent increase in the retired pay of those men in the Coast Guard whose service during 20 or more years of service were not less than 97½ per cent of the maximum. While these acts apply to a different branch of the uniformed services, the fact remains that service in the United States Coast Guard is more similar to that of the Navy than any other of the uniformed services. It would seem that the Congress in 1949 and 1950 made provision for the continued payment of the good conduct increase to retired enlisted men of the Coast Guard because a like increase had been provided for men similarly retired from the United States Navy. *Cf. Tiger* v. *Western Investment Co.*, 221 U.S. 286, 309; *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 408-52

(Decided January 31, 1956)

CHARLES G. HULSE

v.

THE UNITED STATES

Mr. Fred W. Shields for the plaintiff. *Mr. Calvin H. Childress* and *Messrs. King & King* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for defendant. *Mr. Arthur E. Fay* was on the brief.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff sues for increased retired pay which, he says, is due him under certain statutes for long service in the Navy. He first enlisted in the Navy on May 17, 1915, and served continuously under successive enlistments until July 1, 1931, when he was transferred to the Fleet Reserve, credited with 16 years or more of active service. He was immediately recalled to active duty and served continuously until December 8, 1945, when he was released to inactive duty. Upon his release to inactive duty he was paid retired pay based upon one-third of his active duty pay as increased 50 percent for longevity. This pay was based upon section 203 of the Naval Reserve Act of June 25, 1938, 52 Stat. 1175, 1178.

The Naval Reserve Act of 1938 was amended by the Act of August 10, 1946, 60 Stat. 993, and the plaintiff claims that by that Act he was given increased retired pay which he has not received and for which he now sues. His suit is in the alternative. He says that he is entitled, under sec-

tion 204 of the Naval Reserve Act of 1938, as amended by the Act of August 10, 1946, to 2½ percent of his base and longevity pay multiplied by the number of years (30) of his active service. If he is not entitled to that, he claims, in the alternative, under section 203 of the 1938 Act, one-half the base pay he was receiving at the time of transfer to the Fleet Reserve, plus all permanent additions thereto, plus 10 percent for good conduct marks.

Section 203 is applicable to men who enlisted in the Navy on or before July 1, 1925, and section 204, in general, is applicable to men who enlisted after that date. The reason for the different treatment is that by the Act of February 28, 1925, effective July 1, 1925, the privilege of transfer to the Fleet Reserve after only 16 years of service, which privilege seamen had had under the Act of August 29, 1916, was taken away, as to those who should enlist in the future, but the rights of those who had enlisted before July 1, 1925, in reliance upon the law as it then was, were preserved in the 1925 Act, and again in section 203 of the 1938 Act. A fuller discussion of the history of this legislation appears in this court's opinion in *Sanders* v. *United States,* 120 C. Cls. 501.

The plaintiff's preference, as between his alternative claims, is for the rights granted by section 204, as amended, which reads as follows, except for omissions of irrelevant parts:

> SEC. 204. Members of the Navy who first enlisted in the Navy after July 1, 1925, or who reenlisted therein after July 1, 1925, having been out of the Regular Navy for more than three months, may upon their own request be transferred to the Fleet Reserve upon the completion of at least twenty years' active Federal service. After such transfer, except when on active duty, they shall be paid at the annual rate of 2½ per centum of the annual base and longevity pay they are receiving at the time of transfer multiplied by the number of years of active Federal service: * * * *Provided further,* That the pay authorized in this section shall

not exceed 75 per centum of the active-duty base and longevity pay they were receiving at the time of transfer: *Provided further,* That all enlisted men transferred to the Fleet Reserve in accordance with the provisions of this section and of sections 1 and 203 of this Act shall, upon completion of thirty years' service, be transferred to the retired list of the Regular Navy, with the pay they were then legally entitled to receive: *Provided further,* That nothing contained within this section shall be construed to prevent persons who qualify for transfer to the Fleet Reserve under the provisions of section 203 of this Act from being transferred in accordance with the provisions of this section if they so elect: * * * *And provided further,* That the provisions of this section shall apply to all persons of the class described herein heretofore or hereafter transferred to the Fleet Reserve, except that no increase in pay or allowances shall be deemed to have accrued prior to the date of the enactment of this amendment. * * *

The plaintiff, in support of his claim that section 204 applies to him, points to the 4th proviso which says that "all enlisted men transferred to the Fleet Reserve in accordance with the provisions of * * * section * * * 203 of this Act shall, upon completion of thirty years' service, be transferred to the retired list of the Regular Navy, with the pay they were then legally entitled to receive." The plaintiff was transferred to the Fleet Reserve in 1931 in accordance with the provisions of section 203, which permitted such transfer after 16 years of service; and then went on to complete more than thirty years of active service.

The plaintiff points to the 5th proviso of section 204 which says that persons who qualify for transfer to the Fleet Reserve under section 203 may elect to transfer under section 204. This apparently means persons who qualify under section 203 and also under section 204.

The plaintiff points also to the final proviso which says that section 204 shall apply to all persons of the class described herein, "heretofore or hereafter" transferred to

the Fleet Reserve. He says that the fact that he transferred to the Fleet Reserve in 1931 does not disqualify him to claim the benefits of section 204.

The Government urges that the plaintiff is not covered by section 204, and points to the language at the beginning of the section which, it says, limits the application of the section to persons who first enlisted in the Navy after July 1, 1925, or who reenlisted thereafter after a break of more than three months in their service. The Government urges that only persons answering this description are covered by the section. The plaintiff does not answer this description. His service was continuous from 1915 until 1945.

We think that the persons described at the beginning of section 204 are not the only persons covered by the section. It is more usual practice to use provisos to exclude from the operation of statutes persons or situations which would otherwise be covered by their general language. But in this statute the fourth, fifth, and final provisos seem to us to cover persons not covered by the description at the beginning. The fifth proviso says plainly that persons who qualify for transfer to the Fleet Reserve under section 203 may elect to be transferred under section 204. But a person who qualified under 203 must have enlisted before July 1, 1925, and therefore could not qualify for 204 under the language used at the beginning of 204.

Congress put section 204 on an elective basis for the section 203 men because, under certain circumstances, a man with 20 years or more of service would get more on the section 203 basis of one-half of the base pay plus permanent additions, plus 10 percent for good conduct, than he would get on the section 204 basis of 2½ percent of base and longevity pay multiplied by the number of years of service. See 92 Cong. Rec. 10354, where a proposal to make section 204 mandatory for men with 20 years of service was stricken out of the bill, the Senator in charge

of the bill saying, as to the offered amendments, "They merely seek to preserve existing rights."

The Government urges that, for some reason, the plaintiff has made his election to take the benefits of section 204 too late. We think not. The legislation is confusing, the Government is even now urging that the plaintiff had no right to the benefits of section 204, and we think a Navy man cannot be charged with laches because he is not more adept in the interpretation of statutes than are the Government's lawyers.

The plaintiff is entitled to have his retired pay computed on the basis of section 204 of the Naval Reserve Act of 1938, as amended by section 2 of the Act of August 10, 1946, *supra*, from August 10, 1946, to the date of judgment. For the period between his release to inactive duty on December 8, 1945, and August 9, 1946, he received retired pay based upon one-third of his base pay as increased 50 percent for longevity. This pay was computed on the basis provided in section 203 for men who transfer to the Fleet Reserve, as the plaintiff did, after 16 years of service. The plaintiff claims that section 208 of the Act of June 25, 1938, added by section 3 of the Act of August 10, 1946, 60 Stat. 994, entitles him to have his retired pay computed upon the basis of half-pay plus permanent additions thereto, as increased by 10 percent on account of good conduct.

Since we have held, above, that for the period beginning with August 10, 1946, the plaintiff is entitled to the benefits of section 204, the problem as to the applicability of section 208 arises only with reference to the period December 8, 1945, the date of his release to inactive duty, to August 9, 1946, the day preceding the beginning of his rights under section 204. This question was considered and decided as the plaintiff would have us decide it, in *Sanders* v. *United States,* 120 C. Cls. 501. The Government does not ask us to reconsider that decision, except as to one point, hereinafter discussed.

The holding in the *Sanders* case was that section 208, added to the Naval Reserve Act by the Act of August 10, 1946, authorized the addition of the time spent in active duty after transfer to the Fleet Reserve, for the purpose of determining whether seamen should receive, as retired or retainer pay, under section 203, one-third pay based on 16 but less than 20 years of service or one-half pay based on 20 or more years of service. The Government argued in that case that since section 208 spoke of percentages and not of fractions, it did not apply to pay determined by fractions. In the *Sanders* case the court held that the plaintiff was entitled to have, as retired pay, one-half the sum of his base pay plus 35 percent for longevity plus 10 percent for good conduct.

The pertinent language of section 203 is:

> • • • one-half of • • • base pay • • • plus all permanent additions thereto: *Provided,* That the pay authorized in this section shall be increased 10 per centum for all men who may be credited with extraordinary heroism in the line of duty or whose average marks in conduct for twenty or more years shall be not less than 95 per centum of the maximum: • • •.

In the original briefing and argument of the *Sanders* case the question of the 10 percent increase for good conduct was not raised. The court's opinion did not discuss the question, but said, in a footnote, at p. 510:

> It is nowhere contended that plaintiff is not entitled to good conduct pay provided the requisite 20 years' active duty time may be counted. Plaintiff's conduct marks are above the minimum requirement.

Entry of judgment in the *Sanders* case was suspended pending the filing of a computation by the General Accounting Office of the exact amount to which the plaintiff was entitled. In its response transmitting the computation, the General Accounting Office stated that it thought the court was in error in allowing the good conduct pay, and that it was not willing to authorize the Navy to com-

pute the retired pay of other persons on that basis. See 32 Comp. Gen. 159.

After receiving the report from the General Accounting Office this court, on its own motion, vacated and withdrew its decision and opinion, and remanded the case, requesting briefs and argument on the question of the good conduct pay. After considering the briefs and argument, the court reinstated its earlier decision, without any change. The Government urges us to reconsider the question of the good conduct pay.

We have quoted above what section 203 says about additions to base pay, for the purpose of determining retired pay. Section 208, on which the plaintiff's right is based, was, as we have seen, not enacted until August 10, 1946, after all the plaintiff's active service was over. It was, it may be noted, expressly made applicable to persons who had been retired before its enactment. But it created a new right, the right to count active service performed after transfer to the Fleet Reserve, and it is on the basis of that new right that persons like Sanders and the plaintiff get half-pay rather than one-third pay. That being so, Congress could, without breach of faith with those who had served before section 208 was enacted, impose whatever conditions or limitations it thought wise upon the new right.

If section 208 had said that, in counting length of service for the application of section 203, all active duty, whether before or after transfer to the Fleet Reserve should count, then section 203, which provides for good conduct pay, as well as longevity pay and heroism pay, would be the measuring rod for computing the pay. But in section 208 Congress said that the retired pay granted by that section should:

> * * * be based on the enlisted pay received by them at the time they resume an inactive-duty status, including increases in consequence of advancement in rating, longevity, and extraordinary heroism: * * *.

Thus section 208, instead of repeating the language of section 203 "pay at the rate of one-third the base pay they were receiving at the time of transfer, plus all permanent additions thereto" provides for basing retired pay "on the enlisted pay received by them at the time they resume an inactive-duty status, including * * *". We mention this change of language, though it may not, in most cases, have affected the amount of the pay, because it shows that the draftsmen of section 208 gave particular attention to modifying, and not merely copying, the language of section 203. That being so, their express mention of the bonus for extraordinary heroism and their omission to mention the bonus for good conduct seems quite pointed.

The plaintiff urges that the word "including" was used here in the sense of "for example." But the things mentioned were not mere examples of a number of things *in pari materia* that would be relevant. They were all of the things that could be relevant, except one, and that one was also expressly mentioned in section 203, to which they must have turned their attention in drafting section 208.

No reason for the omission of good conduct pay in section 208 has been suggested, and none occurs to us. It may have been inadvertent, an error in dictating or in copying. Whatever was the cause of its omission, we think it is not properly within our province to insert the omitted language. Upon reconsideration, therefore, we overrule that part of the *Sanders* decision which awarded good conduct pay.

The plaintiff is entitled to recover, and his motion for summary judgment is granted. Entry of judgment is suspended pending the filing of a computation by the General Accounting Office showing the amount due in accordance with this opinion.

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 720

CHARLES G. HULSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–8a) is reported at 137 F. Supp. 745.

JURISDICTION

Final judgment in the Court of Claims was entered on November 7, 1956. The petition for certiorari was filed on January 29, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).[1]

[1] It should be noted that this case presents one aspect of the problem of timeliness of the application for certiorari which was before this Court in *United States* v. *Tanner*, No. 280, October Term, 1955, certiorari denied, 350 U. S. 842, and is presently pending before the Court in *United States* v. *The Ohio Power*

QUESTION PRESENTED

Whether the Court of Claims properly rejected petitioner's claim for good conduct pay since he was, and is, not eligible for such pay under the provisions of the Naval Reserve Act of 1938 and since a new provision of the Act of August 10, 1946, excludes reference to good conduct increases while specifically liberalizing his retirement pay benefits in other respects.

STATUTES INVOLVED

The pertinent statutes are set forth in pages 2–7 of the petition.

STATEMENT

Petitioner first enlisted in the United States Navy on May 17, 1915. He was transferred to Class F4C Fleet Naval Reserve on July 1, 1931, pursuant to Section 26 of the Naval Reserve Act of 1925, at which time he had completed more than 16 but less than 20 years of active service. He was recalled to active duty on July 2, 1931, and remained on such duty to December 8, 1945, when he was released to inactive duty. On July 1, 1946, he was transferred from the Fleet Reserve to the retired list of the Navy in the

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Company, Oct. Term, 1955, No. 312. Here, the issue posed by the petition for certiorari, the validity of the denial by the court below of petitioner's claim for good conduct pay, was finally resolved against petitioner on January 31, 1956. See Pet. App. 8a. The order pursuant to the January 31 decision, set forth *infra*, p. 3, made reference to the future entry of money judgment on claims on which petitioner had prevailed but, of course, made no reference to the claim finally denied at that time.

advanced rank of Lieutenant, effective January 1, 1946, having completed a total of more than 30 years of active service.

After his release from active duty, petitioner received retired pay based on one-third of his base pay as increased by 50 percent for longevity. His suit in the Court of Claims was brought in the alternative. He claimed that he was entitled to the difference in the retired pay received by him since his release from active duty and that to which he was entitled under Section 204 of the Naval Reserve Act of 1938, as amended by the Act of August 10, 1946 (Pet. 4–6), which would be 2½ percent of his active duty pay multiplied by 30, the years of active service credited to him. Alternatively, he claimed that he was entitled to the difference in the pay received and that to which he was entitled under Section 203 of the 1938 Act (Pet. 3–4) and Section 208 of the 1946 Act (Pet. 6–7), which was claimed to be one-half the base pay plus permanent additions thereto as increased by 10 percent for good conduct marks.

On January 31, 1956, the Court of Claims handed down its opinion and the following order (Pet. App. 8a):

> The plaintiff is entitled to recover, and his motion for summary judgment is granted. Entry of judgment is suspended pending the filing of a computation by the General Accounting Office showing the amount due in accordance with this opinion.

In its opinion, the Court of Claims held that, after August 10, 1946, the effective date of amended Section

204, petitioner was entitled to have his retired pay computed at the rate of 2½ percent of his active duty pay multiplied by 30, the years of his active service (Pet. App. 5a). The court also held that from December 8, 1945, the date of petitioner's release to inactive duty, to August 9, 1946, he was entitled to have his retired pay computed on the basis of one-half his base pay plus permanent additions thereto. However, upon reconsideration of its decision in *Sanders* v. *United States*, 120 C. Cls. 501, the court denied petitioner's claim to good conduct pay for this eight-month period (Pet. App. 8a).

On February 29, 1956, the petitioner filed a motion for a new trial based on the denial of good conduct pay. This motion was denied on May 1, 1956. Judgment on those claims on which petitioner prevailed was entered on November 7, 1956, after receipt of the reports from the General Accounting Office showing the exact amount due petitioner. The petition for a writ of certiorari was filed on January 29, 1957.

ARGUMENT

After very careful consideration of the statutory provisions on which petitioner's claim for good conduct pay is based,[2] the Court of Claims held, and we think correctly, that there is no statutory authority for such a benefit, and, moreover, that even if the

[2] The court had held in *Sanders* v. *United States*, *supra*, that good conduct pay was authorized. No reasons were set forth since the question was originally uncontested, and after briefs were submitted on this issue the court entered judgment including good conduct pay without further opinion. See Pet. App. 6a–7a.

omission from the statute were inadvertent, it is not within the court's province to insert it. Prior to the enactment of Section 208 in the Act of August 10, 1946 (Pet. 6–7), petitioner's retired pay was based on the provisions of Section 203, Naval Reserve Act of 1938 (Pet. 3–4). Under these, as an enlisted man who had transferred to the Fleet Reserve after sixteen, but less than twenty years' service, he was entitled to retired pay at the rate of one-third of the base pay at transfer and permanent additions thereto. This differed from the treatment given men with twenty years' service prior to transfer, in that under Section 203 the latter were entitled to a retired pay rate of one-half of the base pay plus permanent additions and could also qualify for a ten percent increase in such pay by attaining good conduct marks of 95 percent for twenty or more years.[3]

In Section 208 of the 1946 Act, Congress created a new right which enabled men like the petitioner to count active service performed after transfer to the Fleet Reserve in computing their retired pay. This entitled him to half-pay rather than one-third and allowed for "increases in consequence of advancement in rating, longevity and extraordinary heroism." As the Court of Claims stated, by specifically enumerating these benefits, the drafters of Section 208 consciously modified the general "permanent additions" phraseology of Section 203. However, when faced with the only specific increases set out in Section 203—

[3] Petitioner recognizes this as one of the "primary differences" between the two classes (Pet. 13).

those of the first proviso for good conduct and extraordinary heroism (Pet. 4)—the drafters of the new Section 208 repeated only the increase for extraordinary heroism (Pet. 7). This comparison indicates that the omission of good conduct pay in Section 208 was not inadvertent. Ordinarily, where persons and things to which a statute refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature. The force of this rule *expressio unius est exclusio alterius* is considerably strengthened here by the omission in Section 208 of only one of the two merit increases coupled together in the section being modified, *i. e.*, Section 203 of the 1938 Act. See Sutherland, *Statutes and Statutory Construction* (3rd ed.), Sec. 4915, and cases cited therein.

Petitioner's principal arguments indicate the lack of force in his contention that the Act, when considered as a whole, provides for the good conduct increase in this case. On the one hand, he states that Section 203 is still in effect and that the omission of good conduct pay in Section 208 of the amendatory Act of 1946 is not fatal to his claim (Pet. 11). The short answer to this is that under Section 203 he cannot claim the ten per cent increase for good conduct which is restricted to men transferring to the Naval Reserve after twenty or more years; he did not have twenty years of service when he transferred (*supra*, p. 2). Consequently, the claim by petitioner that he is being deprived of a former benefit by this decision of the Court of Claims is unfounded since he was never eligible for that benefit, and is

not now eligible for it under the provisions of Section 203.

Taking the opposite tack to explain away the omission of good conduct pay in Section 208 of the 1946 Act, petitioner also contends that this Section was intended to equalize treatment between the sixteen-year class and the twenty-year class dealt with in Section 203 and, therefore, must be construed to include the benefit. However, the inconclusive, basically mute, legislative history of Section 208 cited by petitioner fails to substantiate this interpretation. Captain Hopwood's testimony before the Senate Naval Affairs Committee was couched in general terms without specific consideration of the additional bonuses.[4] Since Congress deleted the good conduct bonus from S. 1438, which was the original version of Section 208, the only reasonable assumption, lacking adequate evidence to the contrary, is that it intended to delete it. No such contrary evidence is brought forward by petitioner. The reason for the deletion may well have been that Congress intended a substantial increase in benefits to sixteen-year men but not complete equalization with twenty-year men. As the Court of Claims concluded (Pet. 7a):

> * * * Congress could, without breach of faith with those who had served before section 208 was enacted, impose whatever conditions or limitations it thought wise upon the new right.

Even if the omission in Section 208 was inadvertent, the court below could not supply the omission by a

[4] See testimony of Captain Herbert G. Hopwood on S. 1438, Hearings before the Committee on Naval Affairs, United States Senate, 79th Cong., Oct. 11, 1945, pp. 42–46.

process of interpretation; such action would have to be taken by Congress. *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260. In the Coast Guard retirement pay legislation cited by petitioner (Pet. 15), enacted after Section 208, Congress has demonstrated that it knew of the good conduct pay issue and would explicitly include it as an increase if it meant to award it at all.

In summary, both the structure of the statute and its legislative history indicate that Section 208 was intended to give members of the sixteen-year class under Section 203 the substantial benefits specifically included, and no more than that. In the area of military pay, Congress has always acted with the greatest specificity. Had Congress intended to grant the additional increase which petitioner claims, it would have done so by explicit language and openly declared its purpose. We submit that nothing in the language, history or purpose of Section 208 of the Act of 1946 gives petitioner the good conduct pay increase which he claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 720

CHARLES G. HULSE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

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PETITIONER'S BRIEF IN REPLY

Respondent in its brief does not dispute the fact that the decision in this case does, and will continue to affect the retirement rights of several thousand enlisted men of the United States Navy. It also involves the construction of the statutes upon which such retirement rights are based. Under the circumstances it would seem obvious that the case involves a significant legal question involving questions of importance which

is in the public interest to have decided by this court of last resort. *cf.* Dissent of Mr. Justice Frankfurter in *James C. Rogers* v. *Missouri-Pacific Railroad Company,* #28; *John W. Webb* v. *Illinois Central Railroad Company,* #42; *Virgil Herdman* v. *Pennsylvania Railroad Company,* #46; and *Henry Ferguson* v. *Moore-McCormack Lines, Inc.,* #59, October Term, 1956, decided February 25, 1957. As a case raising questions that are not evidentiary but, instead, fairly involve the construction and scope of the statute, it is appropriate for review here. See *e.g. Minneapolis & St. L. R. Co.* v. *Bombolis,* 241 U.S. 211; *Southern Pacific Co.* v. *Gileo,* 351 U.S. 493; *Reed* v. *Pennsylvania R. Co.,* 351 U.S. 502.

Respondent in its brief urges that under Section 203 of the Naval Reserve Act of 1938, 52 Stat. 1175, 1178, as amended, the petitioner cannot claim the 10 per cent increase for good conduct because the section restricts it to men who were transferred to the Fleet Reserve after 20 or more years of naval service and he did not have 20 years of service when transferred.

If respondent's position is sound, it would follow that the only benefit that petitioner would be entitled to under Section 208 of the Naval Reserve Act of 1938, *supra,* as added by the Act of August 10, 1946, 60 Stat. 993-994, would be the right to a percentage increase on account of longevity pay increase accruing by reason of service performed after recall to active duty. Certainly Section 203 limits retainer or retired pay at the rate of one-half base pay, plus permanent additions thereto, to those men transferred to the Fleet Reserve after 20 years' naval service. The Court in *Sanders* v. *United States,* 120 C. Cls. 501, recognized

that the language of Section 208 was broad enough to give persons recalled to active duty the same rights as were given to men initially transferred to the Fleet Reserve upon the completion of 20 or more years' naval service, including the increase on account of good conduct. Section 208 specifically lists all the increases or benefits which could accrue to a man recalled to active duty after recall but does not specifically list the good conduct increase provided by Section 203 because the good conduct increase necessarily had to be based upon service performed both before and after recall. Section 203 only made provision for the good conduct increase and under its provisions the good conduct increase would be paid to all persons whose marks in conduct were 95 per cent of the maximum for 20 years' service. If, under Section 208, a man recalled to active duty after transfer is entitled to "percentage-rate increases" resulting from such service it should properly include all percentage-rate increases including the 10 per cent increase on account of good conduct for over 20 years' naval service, and not be limited to the single increase in percentage rate from one-third base pay to one-half base pay, plus permanent additions thereto. The Court so construed the law in *Sanders* v. *United States, supra,* and in some 3400 cases decided upon the authority of its decision there.

Respectfully submitted,

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